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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE

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KENNETH ROVACK,

Plaintiff,

MEMORANDUM
AND ORDER

-against-

08 CV 1617 (NG)(RML)

ANTHONY V. LOTITO, CATHERINE G.
LOTITO, KRZYSZTOF ANIOLCZYK,
and JOLANTA ANIOLCZYK,

Defendants.
-----X

LEVY, United States Magistrate Judge:

Plaintiff Kenneth Rovack ("plaintiff") filed the complaint in this diversity action on April 18, 2008. On June 30, 2009, plaintiff moved for leave to file an amended complaint. Defendants Krzysztof Aniolczyk and Jolanta Aniolczyk (collectively, the "Aniolczyk defendants") have opposed plaintiff's motion. For the reasons set forth below, plaintiff's motion is granted.

BACKGROUND AND FACTS

In this action, plaintiff alleges that he sustained various injuries on May 24, 2005. (See Complaint, filed April 18, 2008 ("Compl.")). According to the complaint, on that date a motor vehicle operated by defendant Krzysztof Aniolczyk and owned by defendant Jolanta Aniolczyk collided with a motor vehicle operated by defendant Anthony Lotito and owned by defendant Catherine Lotito (the "Lotito vehicle"). (Compl. ¶¶ 9-12.) The collision propelled the Lotito vehicle into plaintiff, who was walking along the sidewalk nearby, and drove him through a bridal shop's plate-glass window. (Compl. ¶ 12.) In his complaint, plaintiff alleges the following injuries:

- a. multiple trauma;
 - b. lacerations to the left hand, including base of thumb, requiring tetanus immunization;
 - c. abrasions to the mouth, left knee, left ankle and foot;
 - d. sprain to the left wrist and hand;
 - e. sprain to left ankle and mid-foot;
 - f. tenosynovitis of the posterior tibial tendon;
 - g. an activation and/or an aggravation of preexisting asymptomatic bilateral facet osteoarthritis at L4-5;
 - h. moderate right hydronephrosis secondary to a ureteropelvic junction obstruction necessitating surgery;
 - i. a general shock to his nervous system; and
 - j. severe anxiety and apprehension about his mental and physical conditions.
- a.-j. Some or all of which injuries and damages have affected plaintiff's ability to engage in and perform normal activities of daily living and have prevented him from resuming his pre-accident lifestyle.

(Compl. ¶ 13.) Plaintiff now seeks to file a new complaint in order to add the following additional claims of injury (the "additional claims"):

- 1. blunt force head trauma resulting in posttraumatic CSF leak and multiple episodes of meningitis;
- 2. severe headaches;
- 3. a cortical lucency near the posterior aspect of the left ethmoid air cells;
- 4. left-sided maxillary sinus disease; and

5. multiple hospitalizations for repeated bouts of meningitis with associated symptomatology.

(See Plaintiff's Proposed Amended Complaint ¶ 13, attached as Ex. A to Plaintiff's Motion for Leave to File Amended Complaint, dated June 30, 2009.)

DISCUSSION

"The court should freely give leave [to a party to amend its pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). Here, the Aniolczyk defendants contend the court should not give such leave, because "the proposed amendment is legally insufficient and it would be futile to grant leave to amend," Pastorello v. City of New York, No. 95 Civ. 470, 2001 WL 1543808, at *4 (S.D.N.Y. Dec. 4, 2001) (quotation marks and citation omitted). Specifically, they argue that plaintiff has (1) "failed to provide an affidavit of merit to the Court" supporting his amended claims and (2) "failed to submit . . . credible medical evidence . . . that these new claims are not barred by the applicable . . . statute of limitations under New York Law."

(Memorandum of Law in Opposition to Plaintiff's Motion for Leave to File Amended Complaint, dated Sept. 24, 2009 ("Defs.' Mem."), at 2.) I will consider both arguments in turn.

A. Affidavit of Merit

The Aniolczyk defendants note that plaintiff raises his additional claims in a brief by his attorney, without providing any medical support "to explain what about petitioner's medical care and treatment caused the discovery of these new injuries and how mere lacerations, abrasions, sprains, swelling and osteoarthritis can result in such significant injuries that somehow fail to manifest itself [sic] until four years after the subject incident." (Defs.' Mem. at 3-4.) Plaintiff has since supplemented his brief with a doctor's declaration. (See Declaration of

Eugenia M. Vining, M.D., dated Nov. 13, 2009 ("Vining Decl."); see also Order, dated Oct. 22, 2009 (allowing plaintiff to submit such a document).) In that declaration, an otolaryngologist who has examined plaintiff and his medical records details relevant aspects of his medical history and concludes that "it is my opinion, based on a reasonable degree of medical probability, that there is a causal relationship between the accident on May 24, 2006 and the head trauma Mr. Rovack sustained as a result of that accident, and his subsequent meningitis." (Vining Decl. ¶ 12.) This declaration moots the Aniolczyk defendants' first argument.

B. Statute of Limitations

The Aniolczyk defendants' second argument is that "[t]he proposed amended complaint is futile in that 'the claim it seeks to assert is barred by the applicable statute of limitations' and no evidence has been presented to demonstrate that the claim 'relate[s] back to the date of an earlier timely pleading.'" (Defs.' Mem. at 3 (quoting Pastorello, 2001 WL 1543808, at *4 (alteration in original)).)

The statute of limitations for this claim is three years, accruing from the date of the alleged tortious conduct. N.Y. C.P.L.R. § 214(5). The accident allegedly occurred on May 24, 2005, so the additional claims would be time-barred unless they relate back to the filing date of the original complaint. To relate back, the additional claims must have arisen "out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B).

"So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." Mayle v. Felix, 545 U.S. 644, 664 (2005) (footnote omitted). "Under Rule 15, the central inquiry is whether adequate notice of

the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading.” Slayton v. Am. Express Co., 460 F.3d 215, 228 (2d Cir. 2006) (internal quotation marks and citation omitted). “Where the amended complaint does not allege a new claim but renders prior allegations more definite and precise, relation back occurs.” Id.

Here, the additional claims allege injuries arising from the same accident described in the original complaint. Plaintiff contends that the inclusion of the term “multiple trauma” in the original complaint, plus “[t]he violent nature of the accident,” were “sufficient to put Defendants on notice that Plaintiff may have sustained head injuries from the accident.” (Plaintiff’s Memorandum of Law in Support of Motion for Leave to File Amended Complaint, dated Aug. 27, 2009 (“Pl.’s Mem.”), at 5-6.) As in their first argument, the Aniolszyk defendants object that the additional claims are “conclusory statements by an attorney without medical support.” (Defs.’ Mem. at 3.) And as with the Aniolszyk defendants’ first argument, plaintiff has eliminated this problem by submitting the Vining Declaration.

I find that the additional claims “arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading,” Fed. R. Civ. P. 15(c)(1)(B). Accordingly, the additional claims relate back to the date of the original complaint.

CONCLUSION

For the above reasons, plaintiff's motion for leave to file an amended complaint is granted.

SO ORDERED.

Dated: Brooklyn, New York
January 26, 2010

s/RML

ROBERT M. LEVY
United States Magistrate Judge